

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-7685

To be argued by
SAM RESNICOFF

United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE T. BRAV, JOSEPH ANZALONE, RAYMOND
BENOIT, BERNARD BERKOWITZ, JOHN BLANDE-
BURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY
FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH
HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA,
LOUIS LINHART, THOMAS LONGOBARDI, LEONARD
MALLON, FRANCIS McCALL, DANIEL MCCARTHY,
WILLIAM MCCARTHY, FREDERICK MOONEY, GEORGE
NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VIN-
CENT SALAMONE, DOMINICK SANSOSTI, SANTO
SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY,
STANLEY STRYJEWSKI, VINCENT TUMMARELLO and
EUGENE VAUGHAN,

Plaintiffs-Appellants,

against

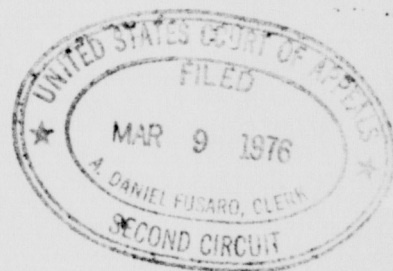
JAMES H. TULLY, JR., Commissioner, New York State Depart-
ment of Taxation and Finance; NEW YORK STATE EM-
PLOYEES' RETIREMENT SYSTEM; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, and
ARTHUR LEVITT, Comptroller, State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' BRIEF

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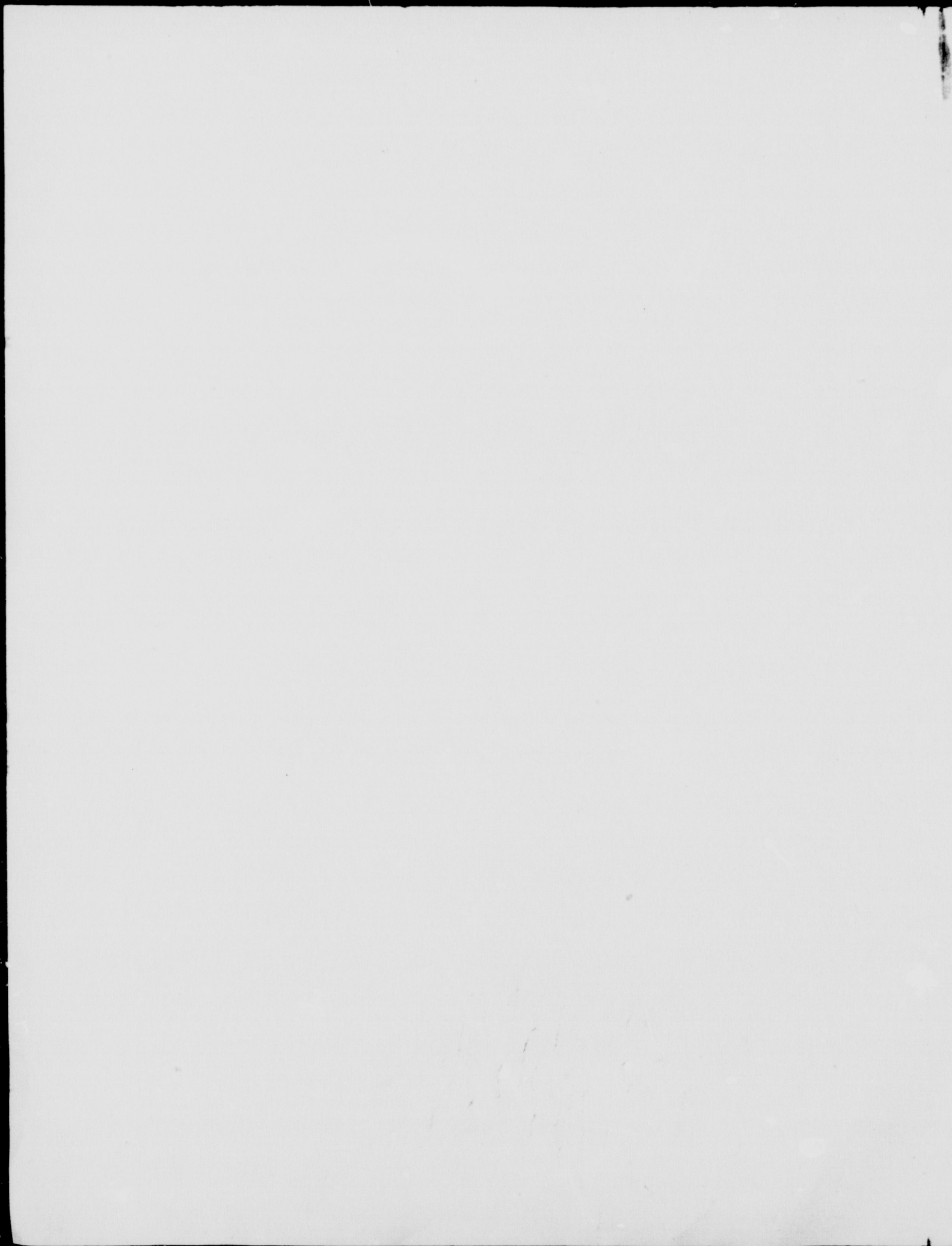


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FOR THE SECOND CIRCUIT

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS McCALL, DANIEL MCCARTHY, WILLIAM MCCARTHY, FREDERICK MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODOITS, VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT TUMMARELLO and EUGENE VAUGHAN,

Plaintiffs-Appellants,

against

JAMES H. TULLY, Jr., Commissioner, New York State Department of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and ARTHUR LEVITT, Comptroller, State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' BRIEF

Preliminary Statement

This is an appeal from an order and judgment made and entered on November 14, 1975, by United States District Judge JAMES T. FOLEY which denied plaintiffs motion for a three-judge court and dismissed the complaint (pp. 39a-51a).

THE FACTS

Appellants are honorably discharged veterans of the Armed Forces of the United States and are retired Police Officers of the Police Department, City of New York. While employed as Patrolmen, they were required to and did contribute to the New York City Police Department Pension Fund. The Police Pension Fund is a pension system which is separate and apart from the New York City Employees' Retirement System. Membership therein is limited exclusively to the Uniformed Members of the New York City Police Department. The New York City Police Department Pension Fund is neither maintained, sponsored or subsidized by the State of New York nor by defendant the New York State Employees' Retirement System.

Having served the required number of years as Patrolmen, etc., appellants were retired and thereafter commenced receiving their pensions.

The New York State Civil Service Commission announced an open competitive examination for the position of Excise Tax Investigator, New York State Department of Taxation and Finance (pp. 21a-23a). The Civil Service announcement for said examination provided "candidates must have seven years of full-time paid experience in law enforcement or investigative work in a governmental police agency dealing with the investigation of criminal activities." As former Patrolmen, appellants were eligible to compete in said examination. Nothing in said announcement stated that retired New York City pensioners would be required on or after appointment to waive their pensions and

would also be ineligible to join and become members of the New York State Employees' Retirement System. All of the appellants filed applications to compete in the written examination and disclosed their prior employment as Police Officers and their status as pensioners (11a). Appellants were marked qualified and were permitted to compete in the written examinations.

All of the appellants passed the written tests and were placed on the eligible list. Thereafter, appellants were certified from said eligible list and were appointed. As stated by appellants (32a):

" *** As Excise Tax Investigators, we are Law Enforcement Officers. We carry firearms and make arrests. We search vehicles carrying contraband cigarettes into the State of New York. We execute Search Warrants. As Peace Officers, we are engaged in hazardous work."

Having satisfactorily completed their probationary period of employment and having acquired tenure as competitive civil service employees, appellants requested they be permitted to join and become members of the New York State Employees' Retirement System. By letter dated March 3, 1975 (p. 24a), the Director of Personnel of the New York State Department of Taxation and Finance advised appellants as follows:

"In reply to your recent inquiry, the Law pertaining to the New York State Employees' Retirement System, Section 40E, states:

'Any person who is or may be entitled to benefits by any other law providing for pensions and annuities for civil service employees, wholly or partly at the expense of the state or of a political subdivision thereof, shall not be a member.'

"As you see, this clause prohibits your enrollment in the retirement system."

Although appellants were tenured civil service employees and were annually rated (p. 13a, 20a), they were advised in writing that if they wished to remain in their positions as Excise Tax Investigators they would have to waive their police pension checks (pp. 7a, 14a, 25a, 33a). Fearful of losing their positions, appellants signed waivers which were prepared by the agency "under protest and without waiver of rights" (p. 25a).

THE ANSWER

The answer which was served on July 2, 1975, and not on October 22, 1975 as stated by the Judge below (41a), admitted the material allegations in the complaint, to wit, that appellants successfully competed in the written examination for Excise Tax Investigator, New York State Department of Taxation and Finance and were permanently appointed from an eligible list; that appellants have tenure and a property interest in their positions; that appellants in their application forms to take the examination and

all other civil service papers which they prepared and submitted to defendants disclosed their prior employment as Police Officers, Police Department, City of New York, and their status as retired pensioners; that all of the appellants are annually rated and receive a written performance rating; that appellants perform hazardous work as Peace Officers and are required to carry guns; that Sections 40(e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Laws "do not discriminate against a person who is receiving a pension from the United States Government or from any state or municipality outside the State of New York from being employed as an Excise Tax Investigator with defendant New York State Department of Taxation and Finance" (par. 25, p. 15a), and should such a pensioner become a New York State employee he would be permitted to join and become a member of defendant the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM.

The answer further stated that defendants were bound by Sections 40 and 211 of the New York State Retirement and Social Security Law, and that the New York City Employees' Retirement System should have been joined as a party.

THE ISSUES

Since appellants are prohibited from joining and becoming members of the New York State Employees' Retirement System, their beneficiaries would be denied death insurance benefits and denied the benefits of accidental death (Section 61), ordinary disability retirement (Section 62), and accidental disability retirement if appellants were injured in the line-of-duty (Section 63, Retirement and Social Security Laws).

Sections 40(e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Laws which defendants have invoked against appellants, are not applied to persons receiving pensions from the United States Government or from any state or municipality outside the State of New York. Should such a pensioner become a New York State employee he would be permitted to join and become a member of the New York State Employees' Retirement System (p. 15a). As alleged by appellants (p. 33a):

"However, since we are not permitted to join and become a member of the New York State Employees' Retirement System, our families in the event of our death in the performance of our duties, will not be permitted to claim death insurance benefits or accidental death benefits. Additionally, if we are assaulted, maimed or seriously injured in the line of duty, we would be unable to make a claim for ordinary disability retirement or accidental disability retirement."

Appellants maintain that because of the statutes (which are being challenged herein), they are being harassed, discriminated against and deprived of equal justice and equal treatment under the law. Appellants contend said sections are invidious, offensive, obnoxious and unconstitutional inasmuch as they are being deprived of property rights, to wit: their vested contractual right to a pension, the right to earn a living, and the right to due process and the equal protection of the laws (p. 16a).

THE COURT BELOW:

This action was instituted on April 11, 1975 in the Southern District of New York. By stipulation, the action was transferred to the Northern District (p. 2a-3a). Issue was joined by the service of an answer on or about July 2, 1975. By motion, appellants invoked the three-judge court statute. Appellee moved for judgment dismissing the complaint. Judge FOLEY in denying the motion for a three-judge court and in granting dismissal, held (p. 46a):

"In a line of unbroken decisions, the United States Supreme Court has made it clear that government pensions granted by statute and not incorporated into a collective bargaining or insurance contract, including those to which an employee contributes, are not vested property rights and they may constitutionally be given, withheld, distributed, reduced, modified and otherwise conditioned as the government, in its lawful discretion, sees fit. *** "

Judge FOLEY further held (p. 48a):

"In my judgment, the claim of plaintiffs to a denial of property without due process for the statutory refusal under the New York Retirement and Social Security Law §40(e) and §213 to allow entry into a second public retirement system under this clear judicial reasoning and conclusion states an insubstantial federal claim foreclosed

by previous decisions of the Supreme Court.

The remaining claim made by plaintiffs is that their acceptance of their new jobs as State Tax Investigators cannot be preconditioned on the waiver of their New York City pensions pursuant to Article 7 of the New York Retirement and Social Security Law because they were previously acquired independent to their present state employment. This claim is grounded on the legal theory that their New York City pensions are vested rights due to the contributions made by plaintiffs to the pension fund. This contention needs little discussion because it was also the subject of a decision by the Supreme Court which held no right of property was created or vested to the pensioner for this reason. Pennie v. Reis, supra; see also Stouper v. Jones, supra, 284 F. 2d at 242-43; Rafferty v. United States, supra, 210 F. 2d at 937; In Re Goodwin, supra, 57 F. 2d at 32."

The Statutes Involved:

Article 5, Section 7 of the New York State Constitution provides as follows:

§7. (Membership in retirement systems; benefits not to be diminished nor impaired)

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The challenged statutory provisions of the New York Retirement and Social Security Laws are as follows:

40. Membership of retirement system

e. Any person who is or may be entitled to benefits by any other law providing for pensions and annuities for civil service employees, wholly or partly at the expense of the state or of a political subdivision thereof, shall not be a member. This provision, however, shall not:

1. Affect the membership of any person who legally is a member of the retirement system on July first, nineteen hundred forty-eight.

2. Exclude from membership any person who is or may become a member pursuant to paragraph two of subdivision e of this section.

3. Exclude from membership any person paid a salary from two or more sources, each of which entitles him to membership in a retirement system.

4. Exclude from membership any person holding office pursuant to appointment by the governor by and with the advice and consent of the senate, who at the time of such appointment would otherwise be entitled to a retirement allowance wholly or partly at the expense of the state or of a political subdivision thereof.

5. Exclude from membership any person who is or may become eligible for old-age and survivors insurance benefits pursuant to the provisions of this article except where his position was or is excluded from eligibility for membership in this retirement system in order to extend old-age and survivors insurance coverage to it and such eligibility shall not have been restored.

f. Termination of membership.

§ 210. Definitions

As used in this article:

a. The term "retired person" means a retired member of a retirement system or pension plan administered by the state or **any of its political subdivisions who is receiving a retirement allowance for other than physical disability.**

b. The term "retirement allowance" means the total amount payable to a retired person, whether in the form of pension or annuity, or both, from a retirement system or systems or pension plan or plans administered by the state or any of its political subdivisions.

c. The term "supplemental retirement payment" means the supplemental pension payment or supplemental retirement allowance payable pursuant to article four or article six of this chapter, or section B20-44.1 or chapter forty-nine, title D, of the administrative code of the city of New York, or any other state or local law providing for similar supplemental pension payments or supplemental retirement allowances.

d. The term "final salary" means the maximum salary or compensation which the retired person currently would be receiving in the position from which he was last retired if he had not retired. If such position has been abolished, the appropriate authority or officer prescribed in paragraph (a) of subdivision two of section two hundred eleven of this chapter shall determine, on the basis of the salary or compensation currently paid to persons in similar or comparable positions by the employer from whose service such retired person last retired, the maximum amount of salary or compensation which such retired person currently would be receiving in such position.

e. The term "public service" means the service of the state or any political division thereof, including a special district, district corporation, school district, board of cooperative educational services or county vocational education and extension board, or the service of a public benefit corporation or public authority created by or pursuant to laws of the state of New York, or the service of any agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its political subdivisions.

f. The term "former employer" means the state or a political subdivision, public corporation, school district, board of cooperative educational services, county vocational education and extension board, or an agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its civil divisions, which directly paid the salary or compensation of a retired person at any time during the two years immediately preceding his retirement.

211. Employment of retired persons without diminution of retirement allowance

1. Notwithstanding the provisions of sections one hundred and two, two hundred twelve and four hundred one of this chapter or section five hundred three of the education law, or the provisions of any local law or charter, a retired person may be employed and earn compensation in a position or positions in the public service, without any effect on his status as retired and without suspension or diminution of his retirement allowance subject to the following: (a) His total compensation in such position or positions in any calendar year, including compensation earned under other provisions of this article, shall not exceed the multiple of five hundred dollars next higher than the difference between (1) the sum of his annual retirement allowance computed without optional modification plus annual supplemental retirement payments, if any, and (2) the salary on which his retirement allowance is based or his final salary, whichever is greater; (b) The position in which he is employed is not a position in the service of a former employer.

2. (a) No retired person may be employed in a position in the public service pursuant to subdivision one hereof except upon the approval of

(1) the state civil service commission; or

(2) the commissioner of education if such person is to be employed in the unclassified service of a school district other than the city of New York, a board of cooperative educational services or a county vocational education and extension board; or

(3) the municipal civil service commission of the city of New York if such person is to be employed in a position in the service of the city of New York or in the classified service in the board of education or board of higher education of such city; or

(4) the superintendent of schools of the city of New York if such person is to be employed in the unclassified service under the board of education of the city of New York; or

(5) the board of higher education of the city of New York if such person is to be employed in the unclassified service under the board of higher education of the city of New York; or

(6) the chancellor of state university if such person is to be employed in the unclassified service of the state university of New York, or in the professional service at the state colleges of agriculture, home economics, veterinary medicine or industrial and labor relations, the state agricultural experiment station at Geneva or any other institution or agency under the management and control of Cornell university as representative of the board of trustees of state university of New York, or at the state college of ceramics under the management and control of Alfred university as representative of the board of trustees of state university of New York or in the unclassified service of a community college other than those in the city of New York.

(b) Such approval may be granted only on the written request of the prospective employer of such retired person, which request shall state detailed reasons therefor related to the standards set forth herein, and on a finding, on evidence satisfactory to the appropriate officer or authority specified in paragraph (a),

(1) that the retired person is duly qualified, competent and physically fit for performance of the duties of the position in which he is to be employed;

(2) that there is need for his services in such position;

(3) if he will earn more than one thousand dollars in one year, including compensation earned in such position under other provisions of this article, that there are not readily available for recruitment persons qualified to perform the duties of such position; and

(4) that his employment is in the best interests of the government service. Such approvals may be granted for periods not exceeding two years each. The authority or officer specified in paragraph (a), upon approving employment of a retired person under this section, shall certify such approval to the retirement system or pension plan from which such person is receiving a retirement allowance.

3. If a retired person employed under this section earns in such employment in any calendar year an amount in excess of the maximum earnings allowed under subdivision one of this section, his retirement allowance and supplemental retirement payments shall be suspended until the total amount so suspended equals the amount of such excess.

4. A retired person who returns to public service on or after January first, nineteen hundred seventy-four, as a consultant shall be subject to the limitations applicable to a reemployed retiree as specified in this section or in any other provision of law.

5. Any request for approval of the employment of a retired person under this section, including the reasons stated therefor, and the findings and determination on such request shall be a public record open for inspection in the office of the officer, commission or board making such findings and determination as specified in paragraph (a) of subdivision two of this section.

6. The provisions of this section shall not be construed to authorize the employment of any person in any position in the civil service except in compliance with requirements of the civil service law and rules applicable to such employment.

7. Each officer, commission or board specified in paragraph (a) of subdivision two of this section may adopt appropriate regulations, procedures and forms for implementation of the provisions of this section. Such regulations may authorize employment of a retired person, without prior approval, but pending application for approval under this section, in situations of unforeseen and immediate need.

Sec. 212 Employment of retired persons

Notwithstanding the provisions of sections one hundred one, two hundred eleven or four hundred one of this chapter or of section five hundred three of the education law, or the provisions of any local law or charter, any retired person may continue as retired and, without loss, suspension or diminution of his retirement allowance, earn in a position or positions in public service in any calendar year an amount not exceeding twenty-four hundred dollars, provided such retired person employed under this section duly executes and files with the retirement system from which he is receiving a retirement allowance a statement that he elects to have the provisions of this section apply to him. A statement of election and filed pursuant to this section may be withdrawn by a retired person at any time by a statement similarly executed and filed.

Sec. 212. Employment of retired persons (Eff. July 1, 1976)

Notwithstanding the provisions of sections one hundred one, two hundred eleven or four hundred one of this chapter or of section five hundred three of the education law, or the provisions of any local law or charter, any retired person may continue as retired and, without loss, suspension or diminution of his retirement allowance, earn in a position or positions in public service in any calendar year an amount not exceeding twenty-five hundred dollars, provided such retired person employed under this section duly executes and files with the retirement system from which he is receiving a retirement allowance a statement that he elects to have the provisions of this section apply to him. A statement of election and filed pursuant to this section may be withdrawn by a retired person at any time by a statement similarly executed and filed.

§ 213. Membership in retirement system or service credit not allowed for employment under this article

a. The provisions of any local law or charter notwithstanding, no retired person employed in public service pursuant to the provisions of this article shall be required or permitted to become a member of any retirement system or pension plan administered by the state or any of its political subdivisions.

b. Member service credit may not be purchased or granted in any retirement system or pension plan administered by the state or any of its political subdivisions for any period of employment in public service authorized under the provisions of this article.

§ 214. Continuation of employment privilege of certain retired persons

Notwithstanding any provision of this article, a retired person employed prior to July first, nineteen hundred sixty-four, under the provisions of subdivision f of section one hundred one of the retirement and social security law, or subdivision two of section one hundred fifty of the civil service law, or section one hundred fifty one of the civil service law, or section 9.13 of the mental hygiene law, or section five hundred eleven-b of the education law, or section B20-48.1 of the administrative code of the city of New York, may be similarly employed during the effective period of this article subject to the same conditions and limitations as were applicable to his employment under the respective provisions under which he was employed prior to July first, nineteen hundred sixty-four.

§ 215. Effective period

The privilege granted by this article to retired persons to continue as such and earn compensation in positions in public service shall remain in full force and effect until December thirty-first, nineteen hundred seventy-four.

§ 216. Constitutional convention delegates and employees

a. Notwithstanding anything to the contrary contained in this article or any other section of this chapter or any other provision of any general or local law, a member retired from any public pension system of the state, elected as a delegate of the convention to revise and amend the constitution of the state in the year nineteen hundred sixty-seven, or serving as an employee of such convention may serve and earn compensation in such position without any effect on his status as such retired member and without suspension or diminution of his retirement allowance.

b. Member service credit may not be purchased or granted in any retirement system or pension plan administered by the state or any of its political subdivisions for any period of service in the capacity prescribed by subdivision a.

POINT I.

THE STATE STATUTES BEING CHALLENGED HEREIN
CONFLICT WITH FEDERAL LAW AND THE CONSTITUTION
OF THE UNITED STATES AND ARE THEREFORE INVALID.

The Federal Courts at all levels are now enjoying tremendous prestige and respect. The exalted status of the Federal judicial structure does not exist merely because it has exclusive jurisdiction in bankruptcy, admiralty, patents and copyrights. Its stature has grown because its Judges have not hesitated to step in and assume jurisdiction of matters which years ago would have been considered exclusively within the domain of the state courts.

SECTIONS 2281 and 2284, 28 U.S.C., have indeed been a blessing. Where else could a litigant seek redress with a complaint which on its face seeks an injunction against the enforcement of a state statute or regulation of statewide applicability on the ground of its unconstitutionality?

Where an application for a three-judge court is made pursuant to 28 U.S.C. Sections 2281 and 2284 to restrain state officials and state agencies from the enforcement, operation and execution of state statutes of statewide applicability which are contrary to the Constitution of the United States, a detailed discussion of the merits is unnecessary. It is not incumbent upon the moving party to convince the court that the state statutes being challenged are constitutionally offensive, obnoxious, and contrary to the equal protection laws. Where the issues raised are not

"essentially fictitious", "wholly insubstantial" or "obviously frivolous or without merit", the request for a three-judge court should be granted (GOOSBY v. OSSER, 409 U.S. 512, 518, 1973). In WELLS v. MALLOY, 510 F. 2d 74, decided January 23, 1975, FRIENDLY, J., writing unanimously for the Second Circuit in reversing a judgment which dismissed an action under the Civil Rights Act to enjoin the enforcement of a section of the Vermont Motor Vehicle Act, and remanding with instructions to request the convening of a three-judge court, held:

"In the interests of judicial economy we add that, under the test laid down in GOOSBY v. OSSER (409 U.S. 512, 518, 1973), the district judge should request the convening of a three-judge court, as he apparently would have done but for his views with respect to the prohibition of 28 U.S.C. section 1341. Although UNITED STATES v. KRAS (409 U.S. 434, 1973), provides substantial support to the state's position, it does not 'inescapably render the claims frivolous,' the test laid down in GOOSBY v. OSSER (supra)."

See also STONE v. PHILBROOK, decided by this Court on December 3, 1975, Docket No. 75-7066. Where state provisions conflict with federal law they are invalid (VAN LARE v. HURLEY, decided May 19, 1975, 421 U.S. 338; KING v. SMITH, 392 U.S. 309; LEWIS v. MARTIN, 397 U.S. 552; TOWNSEND v. SWANK, 404 U.S. 282; McMILLAN v. BOARD OF EDUCATION, 430 F. 2d 1145; LAPREASE v. RAYMOURS FURNITURE CO., 315 F. Supp. 716; LYNCH v. BAXLEY, 386 F. Supp. 378; VAIL v. QUINLAN, 387 F. Supp. 630; SUGAR v. CURTIS CIRCULATION CO., 383 F. Supp. 643; ROE v. INGRAHAM, 480 F. 2d 102; LOPEZ v. WYMAN, 329 F. Supp 483; STILPHENS v. YOEMANS, 327 F. Supp 1182; SERO v. OSWALD, 355 F. Supp 1231; ROYSTER v. McGINNIS, 327 F. Supp. 1318; VANASCO v. SCHWARTZ, 401 F. Supp. 87).

The Judge below in attempting to sustain his conclusion (46a) that government pensions granted by statute and not incorporated into a collective bargaining or insurance contract, including those to which an employee contributes are not vested property rights which may constitutionally be given, withheld, distributed, reduced, modified and otherwise conditioned as the government in its discretion sees fit, cited a number of cases which were decided many years ago, to wit, FRISBIE (1895); LYNCH (1934); PENNIE (1889); BURNETT (1883); HALL (1879); WALTON (1857), etc.

The court below was in error. The Judge either failed to consider or overlooked the constitutional sanctity relating to appellants' pensions.

ARTICLE V, SECTION 7 of the NEW YORK STATE CONSTITUTION expressly provides that membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired (SGAGLIONE v. LEVITT, et al., 37 N.Y. 2d 507). ARTICLE 1, SECTION 10, Clause 1 of the CONSTITUTION OF THE UNITED STATES provides that "No State shall pass . . . Law . . . impairing the Obligation of Contracts . . .".

The antediluvian decisions cited by Judge FOLEY must be considered in the setting of the particular cases. It is Hornbook law that no opinion is conclusive authority beyond the point actually decided. In ARMOUR & CO. v. WANTOCK, 323 U.S. 126, Associate Justice JACKSON held:

"It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions

within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the court. General expressions transposed to other facts are often misleading."

A perusal of the cases cited by the Judge below do not in our opinion sustain the conclusion reached by the Court that appellants' pensions are not vested rights. In any event, any case which holds or suggests that theory must be distinguished or rejected. WALTON, 60 U.S. (19 How.) 355 decided in 1857. and BURNETT, 107 U.S. 64 decided in 1883, deal with soldiers and the military. The grant of a Soldier's bonus was an act of gratuity on the part of Congress. The bonus was not a vested right. FRISBIE, 157 U.S. 160 decided in 1895 dealing with a criminal matter, is also distinguishable. In PENNIE v. REISS, 132 U.S. 464 decided in 1889, it appeared that the California Legislature adopted a Police Life and Health Insurance Fund. On March 4, 1889, the Legislature adopted a new Police Relief Health & Life Insurance Pension Fund. On March 13, 1889, a Patrolman died. His administrator sued for the pension payment which had been withheld. The State Court held the legislative act of 1889 was valid and superseded the act of April 1, 1878. The action was dismissed and the administrator sued out a Writ of Error to the Supreme Court. In sustaining the State Court, the Supreme Court held:

" *** The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. ***"

Significantly, the act of the Legislature was merely statutory. There was no constitutional provision as in the case at bar which sanctified appellants' pensions on a constitutional level under the umbrella of a contractual relationship. Therefore, appellants submit that PENNIE is distinguishable.

LYNCH v. U. S., 292 U.S. 571, decided in 1934 is helpful to appellants. In that case, Associate Justice BRANDEIS pointed out that the theory of a gratuity is inapposite in the event of a contract. Judge BRANDEIS held:

"War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress UNITED STATES v. TELLER, 107 U.S. 64, 68; FRISBIE v. U.S., 157 U.S. 160, 166; U.S. v. COOK, 257 U.S. 523, 527. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder."

ARTICLE V, SECTION 7, of the NEW YORK STATE CONSTITUTION provides:

" *** Membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The cases are legion in which the New York Courts have invalidated any attempt to either circumvent or emasculate the sanctity of the constitutional amendment which mandates that membership in a public retirement system is contractual, the benefits of which may not be diminished, impaired, reduced or withheld (DONNER v. NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, 33 N.Y. 2d 413, 353 N.Y.S. 2d 428; KRANKER v. LEVITT, 30 N.Y. 2d 574, 330 N.Y.S. 2d 791; KLEINFELDT v. NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, 36 N.Y. 2d 95, 365 N.Y.S. 2d 500, and MATTER OF AYMAN v. TEACHERS' RETIREMENT BOARD, 9 N.Y. 2d 119, 211 N.Y.S. 2d 198).

The rationale of the court below that the New York City pensions are not vested rights is neither persuasive, legal nor sound. Civil service employees devote a life time of service before they become eligible for their pensions. To hold that appellants who contributed from their salaries to their pension have no vested right thereto is unworkable, unthinkable and unconstitutional.

The Constitution of the United States provides that a state may not impair the obligations of a contract. The New York State Constitution (Article V, Section 7) provides that membership in a retirement system is a contractual relationship, the benefits of which shall not be diminished or impaired. Appellants have alleged that by reason of the statutes being challenged herein,

appellees are impairing their obligations under the retirement contract; that a separate classification of employment has been established for them as retired city pensioners, and that they are being deprived of their property without due process and the equal protection of the laws. In this connection, we respectfully refer to HARPER, et al. v. VIRGINIA BOARD OF ELECTIONS, 383 U.S. 663, wherein Associate Justice DOUGLAS held:

"We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them ~~must~~ be closely scrutinized and carefully confined (citing cases)."

The issues being raised by appellants are neither whimsical, frivolous, fictitious or insubstantial.

Appellees in their answer alleged that the New York City Employees' Retirement System should have been joined as a party.

The NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM is an agency within the City of New York. It was established by local law, to wit, the Administrative Code of the City of New York. It is not a state agency and is neither operated nor controlled by state officials. It has no state-wide applicability. As Police Officers, appellants were never members of the New York City Employees' Retirement System. The New York City Employees' Retirement System is only concerned with individuals seeking employment as New York City employees. Appellants are neither seeking nor requesting any relief against the New York City Employees' Retirement System. They are not New York City employees. They

severed their connection with the City of New York when they retired as Police Officers.

In their brief below, appellees alluded to Section 1117 of the New York City Charter and Section 150 of the New York State Civil Service Law.

Section 1117 of the New York City Charter is not a state statute. It is purely a local law affecting only those employees working for the City of New York. Section 1117 of the City Charter is not enforced by state officials or state agencies. It has no state-wide applicability. Furthermore, a local law or regulation may be declared unconstitutional by a single United States District Judge without the necessity of a three-judge court (McCLENDON v. ROSETTI, 460 F. 2d 111). See also THE SCHOOL BOARD OF PRINCE EDWARD COUNTY, 377 U.S. 218. Section 1117 would be relevant were appellants seeking employment with the City of New York.

Apropos Section 150 of the New York State Civil Service Law which appellees referred to in their brief below, suffice it to say as pointed out by Judge FOLEY (43a) the section "seems to be of little relevance here because it expressly defers to the provisions of Sections 211 and 212 of the New York Retirement and Social Security Law as preeminently controlling."

Appellees in their letter of March 3, 1975 (p. 24a) advised appellants they could not join the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM because 40E prohibited their enrollment in the retirement system. In their Memorandum dated February 4, 1975, appellees advised appellants that if they wished to continue in their employment as

EXCISE TAX INVESTIGATORS with the STATE OF NEW YORK, they would have to waive their city pensions (p. 25a). Appellees in said Memorandum referred to Section 211 of the New York State Retirement and Social Security Law.

The issues involved herein do pose substantial constitutional questions. Are appellants as the recipients of a Police pension being deprived of equal justice and equal treatment because of the New York State Retirement and Social Security Laws? Are the statutes which require appellants to waive their pensions in order to retain their jobs as tenured Excise Tax Investigators constitutional, or do they deprive appellants of their money and property without due process of law? Are the Police pensions which appellants have been receiving for several years a vested right or a mere gratuity which can be taken away or withheld? Is the action of appellees which permits federal pensioners and retired pensioners from other jurisdictions to work for the State of New York and to become members of the New York State Employees' Retirement System without restrictions, discriminatory insofar as appellants are concerned? Since appellants are tenured state employees, is the refusal and failure on the part of appellees to permit appellants to join and become members of the New York State Employees' Retirement System in violation of their constitutional right to due process and the equal protection of the laws and a deprivation of their right to ordinary disability retirement or accidental disability benefits if injured or disabled in the line of duty?

The existence of the above questions compels the conclusion that the state statutes being challenged herein violate the due process and equal protection clauses. The said statutes should be declared unconstitutional, void and no longer to be enforced.

C O N C L U S I O N

THE DISMISSAL OF THE COMPLAINT SHOULD BE
REVERSED AND JUDGMENT SHOULD BE DIRECTED
IN FAVOR OF APPELLANTS.

DATED: New York, March 10, 1975.

Respectfully submitted,

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Attorney for Plaintiffs-Appellants
280 Broadway
New York, N.Y. 10007

DIgby 9-3896.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD
BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO
FAZIO, HARRY FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH
HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART,
THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS McCALL, DANIEL
McCARTHY, WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE
NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT
SALOME, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS,
SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT
TUMMARELLO and EUGENE VAUGHAN,

Plaintiffs-Appellants,

against

JAMES H. TULLY, Jr., Commissioner, New York State Department
of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT
SYSTEM: NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
and ARTHUR LEVITT, Comptroller, State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 510 Atlantic Avenue, Brooklyn, New York

That on March 9, 1976, he served 2 copies of
Appellants' Brief Plaintiffs-
on

Louis Lefkowitz, Esq.
Attorney General,
State of New York,
Two World Trade Center
New York New York.

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

... Nathan Chambers: ...

Sworn to before me this
9th day of March, 1976

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977